IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

NO. 78-668

GEORGE RAYMOND DIPP,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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GEORGE R. DIPP, petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case.

OPINION BELOW

On July 31, 1978, the Court of Appeals entered its panel opinion with a concurring opinion, not yet officially reported, is reproduced as Appendix A hereof.

JURISDICTION

The Court of Appeals opinion was entered July 31, 1978. A motion for rehearing and suggestion for rehearing en banc were denied by order of the Court of Appeals entered September 19, 1978. A motion to stay the mandate pending the filing of this petition was denied by the Court of Appeals. The motion for stay has been renewed in this court.

Jurisdiction was initiated by criminal indictment of a federal grand jury, and jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED FOR REVIEW

1. Is the administration of criminal justice intollerably debased by the prosecution of an acquitted defendant for perjury on the basis of a secretly recorded conversation with an undercover government agent where (1) the prosecutor told defendant's counsel the government had no written or recorded statements of the defendant; (2) an investigative aide of the prosecutor had been informed by the undercover agent at the time of trial that the tape recording existed and he did not disclose this fact to the court or counsel; and (3) the undercover agent gave false courtroom testimony denying he had acted as an agent and concealing his acts in obtaining the tape recording.

CONSTITUTIONAL AND STATUTORY PROVISIONS

The Fifth Amendment of the United States Constitution provides, in part, that no person shall "be deprived of life,

liberty, or property, without due process of law."

The Sixth Amendment of the United States Constitution provides, in part, that in all criminal prosecutions, the accused shall enjoy the right "to have the Assistance of Counsel for his defense."

18 USC §3500 (the Jencks Act) provides in pertinent part:

> "(b) After a witness called by the United States has testified on direct examination, the court shall, on motion of the defendant, order the United States to produce any statement (as hereinafter defined) of the witness in the possession of the United States which relates to the subject matter as to which the witness has testified. If the entire contents of any such statement relate to the subject matter of the testimony of the witness, the court shall order it to be delivered directly to the defendant for his examination and use.
> * * *
>
> "(e) The term 'statement', as used in subsections (b) . . . of this section in relation to any witness called by the United States, means—
>
> "(1) a written statement made by said witness and signed or otherwise adopted or approved by him;
>
> "(2) a stenographic, mechanical, electrical, or other recording, or a transcription thereof, which is a substantially verbatim recital of an oral statement made by said witness and recorded contemporaneously with the making of such oral statement; . . ."

Rule 16(a)(1)(A) of the Federal Rules of Criminal Procedure provides, in part:

> *"Statement of Defendant.* Upon request of a defendant the government shall permit the defendant to inspect and copy or photograph: any relevant written or recorded statements made by the defendant, or copies thereof, within the possession, custody or control of the government, the existence of which is known, or by the

exercise of due diligence may become known, to the attorney for the government; . . ."

STATEMENT OF THE CASE

Petitioner, hereafter called defendant, was convicted of perjury in violation of 18 USC §1623 and sentenced to three years' imprisonment and a $10,000 fine. He was released on bail pending appeal and posted a $100,000 appeal bond with a 10% cash deposit.

The perjury charge arose out of defendant's testimony for himself at a former trial for conspiracy to smuggle marijuana into this country. Defendant was acquitted of that charge by a jury verdict.

The former trial was an example of an effort by the prosecution to establish the guilt of the defendant by reliance on the testimony of two unindicted alleged co-conspirators (Johnson and Melancon) given in exchange for most substantial concessions by the government.[1]

The alleged co-conspirators testified that defendant provided financial support for the smuggling venture, while they

[1]Johnson had a recent former conviction for smuggling aliens. At the time of the conspiracy trial he was serving a federal sentence for a drug-smuggling offense committed with Melancon—an offense which came after the cessation of their asserted involvement with defendant. In exchange for his testimony against defendant, Johnson was granted immunity, the Government agreed not to prosecute a pending charge against his wife for smuggling aliens, and the facts of his cooperation were related to the judge who sentenced him for the drug-smuggling offense (the same judge who presided at the defendant's conspiracy and perjury trials) who had reduced Johnson's sentence from 4 to 2 years.

Melancon also testified under a grant of immunity, and his sentence for the drug-smuggling case was also reduced from 4 to 2 years, after his cooperation was made known to the judge.

flew marijuana into the United States. Defendant testified he was a business man in El Paso, Texas; that he had given Johnson financial support for a legitimate business venture; and that he had no idea the airplanes he helped purchase were being used to smuggle marijuana.

The prosecutor offered the testimony of one, Paul Finefrock, who testified he was a mere informant and that he had engaged in a smuggling operation with defendant (at a point later in time that the period of the conspiracy alleged in the indictment), and had flown a plane the defendant supplied.[2] Defendant testified he had met Finefrock on only one occasion, and denied he had ever been involved in any smuggling operations with Finefrock.

Six months after his acquittal of the conspiracy charge, defendant was indicted for perjury as to his testimony about his meetings and relationship with Finefrock. This indictment was supported by pre-trial discovery matter showing that Finefrock had in truth been an undercover agent for the government; while working under control of DEA agents, he had been sent from Mississippi to El Paso, to meet with another group of DEA agents, where a plan was developed and carried out in which Finefrock, equipped by the DEA agents with a hidden kel set, talked with the defendant on the phone and lured defendant to Finefrock's hotel room (across the hall from a room occupied for the

[2]Finefrock also struck a good bargain with the Government. He was accorded immunity for his testimony, and it was agreed his cooperation would be made known to a federal court in Mississippi where he was to be sentenced for importing, possessing and distributing marijuana from Colombia, South America. Finefrock had also cooperated with the Government as to the Colombia operation and was granted probation on that offense. The prosecutor wrote a letter about Finefrock's cooperation in the Dipp conspiracy trial, as an aid to a reduction of the probation sentence, which is not known to have further reduced the sentence.

purpose of the plan by numerous DEA agents). Finefrock engaged the defendant in a conversation in which defendant made statements showing his complicity in a smuggling venture with Finefrock. The conversation was secretly recorded. Finefrock also made an extensive de-briefing tape recording of his activities for the government.

The materials supplied by the prosecution demonstrated that Finefrock had not told the truth when he denied at the conspiracy trial that he was a government agent; denied that he had ever been sent anywhere by federal agents; and when he testified, evasively, that federal agents knew he was in El Paso because under his bail bond he had to let them know any place he went.

In the discovery procedures before the conspiracy trial, the prosecutor informed the defendant's attorney[3] that no written or recorded statements existed with respect to the defendant. Also, when Finefrock took the stand, the only pre-trial revelation of his existence had been a representation by the prosecutor that two "cooperating individuals" had supplied information as to defendant's smuggling activity during a period of time after the termination of the alleged conspiracy; that the investigation involved other individuals and was on-going; that no "written or recorded statements" from these two individuals existed with respect to defendant; and that if statements of these witnesses should come into existence, the statements would be provided in compliance with the Jencks Act.

At the conspiracy trial, the defendant requested Jencks Act material on Finefrock. The prosecutor said he was unaware of any such material, except for a few notes he had

[3]Defendant was represented at both trials and before the Court of Appeals by Harry E. Claiborne, who withdrew as counsel when he took office as a United States District Judge for the District of Nevada.

made during a pre-testimonial interview he had with Finefrock. These notes were produced. They bore no indication of Finefrock's true status as a government agent, the work he had done under the direction of DEA agents, or the existence of the tape-recordings in question. The prosecutor turned to a local DEA investigation agent (Dennis Cameron) who had sat at government counsel table throughout the trial, and inquired if it was correct that the only Jencks Act material the government was aware of consisted of the prosecutor's handwritten notes. The local DEA Agent did not make audible response; however, it was the recollection of defense counsel that this agent nodded his head affirmatively, and this recollection has never been disputed in these proceedings.

Defendant moved to dismiss the perjury indictment for government misconduct in not producing the tape recordings before the conspiracy trial (as statements of the defendant), in not producing Finefrock's debriefing statement and other Jencks Act material when Finefrock testified at the conspiracy trial; and in availing itself of the fruit borne by the false testimony of Finefrock.[4]

After a hearing, the trial judge denied the motion to dismiss, expressing these views: (1) That the existence of the tape-recordings and other evidence relied on by the gov-

[4]At a hearing on this motion, defendant's attorney forthrightly pointed out that one of the main purposes of pretrial discovery is to enable defendant's counsel to make appropriate decisions in the case. If such information is not disclosed, the attorney is in jeopardy of putting the defendant on the witness stand believing that the defendant's story is true. Counsel further pointed out that he had been precluded by the government from effectively and fully representing his client, and that the government should not be allowed to take advantage of a situation by a perjury indictment, when the perjurious matter would not have come forth if the government had exercised its responsibility under the discovery statutes.

ernment to prove defendant's perjury was not known to the prosecuting attorney and the local DEA investigating agent at the time of the conspiracy trial;[5] (2) that there was no prosecutorial bad faith and no intentional concealment of evidence;[6] and (3) that since the defendant was acquitted of the conspiracy charge, he cannot complain because evidence implicating him in the smuggling trade was not disclosed and used at the conspiracy trial.

The Court of Appeals' majority panel opinion recognized that defendant's inducement to lie would have been less if the government had produced the tape recording and "clarified" Finefrock's position as an informant-agent. But, the panel majority held that prosecutorial misconduct which merely increases the inducement to lie does not vest a defendant with a license to lie. The perjury of Finefrock as to his status and acts as a government agent was considered "not so serious" as to render the defendant's predisposition to lie irrelevant. This Court's opinions in *United States v. Wong*, 431 U.S. 174 (1977) and *United States v. Mandujano*, 425 U.S. 564 (1976), were cited for the proposition that even when a witness' constitutional rights arguably have been violated, perjury is not a permissible response.

Concurring Circuit Judge Hufstedler expressed the proposition that if the government suppressed knowledge of the existence of the tapes at the first trial, and then used the same evidence for the purpose of obtaining a perjury conviction,

[5]Defendant contends that the undisputed evidence does show that the local DEA agent *did* know of the existence of the tape-recording at the time of the conspiracy trial.

[6]Defendant has earlier conceded that the assistant United States Attorney prosecuting the case was unaware of the existence of the material; but no such concession has been made as to the local DEA agent. Defendant does not concede that the issue raised in this case is resolved by a determination that bad faith did not exist.

the second prosecution would be foreclosed because such government misconduct would be a violation of due process. Her opinion pointed out that this prophylactic measure is not to excuse perjury, but to restore the integrity of the administration of criminal justice. She concurred in the result of the majority panel opinion, however, because she did not view the state of the record as developed sufficiently to determine whether the prosecuting attorney or the local DEA agent knew of the tape recordings and suppressed that knowledge at the conspiracy trial. Defendant disputes this conclusion with respect to DEA Agent Cameron. Cameron admitted that at the time of the conspiracy trial, Finefrock had told him there was a tape recording of the Finefrock-Dipp hotel conversation in El Paso. Agent Cameron even directed another DEA agent to make inquiry of the El Paso DEA office as to the existence of the tape. Agent Cameron said he was informed after such inquiry that no such tape recording existed. But Agent Cameron did not disclose any of these circumstances when he was asked about his knowledge at the conspiracy trial. Other contradictions in Cameron's sworn statements and testimony support the conclusion that Cameron deliberately suppressed crucial information about the El Paso tapes at the time of the conspiracy trial.[7] In view of the number of contacts between

[7]At the conspiracy trial on June 16, 1976, Finefrock testified he gave a statement to Agent Cameron in Reno, Nevada, on November 20, 1975, having been contacted in advance of that meeting at his home in Oklahoma by Agent Cameron four or five days earlier.

In response to defendant's motion to dismiss the perjury indictment, Agent Cameron made affidavit that: He first met Finefrock on March 15, 1976, in Reno; that they had some discussion as to the defendant, but that nothing was recorded or written at that time; that Cameron and Finefrock talked several times by phone before the conspiracy trial; *that at the time of the conspiracy trial Finefrock told Cameron there was a tape re-*

(continued)

Finefrock and Agent Cameron before the conspiracy trial, and the fact that Finefrock had told Cameron about the tape recording, it cannot be doubted that at the time of that trial Agent Cameron well knew that Finefrock was not a mere informant. Again, Agent Cameron failed to make necessary disclosures to the prosecutor, the Court, and defendant and his counsel.

Defendant further contends that the issue of this case cannot be solved by an inquiry into prosecutorial good or bad faith. The administration of criminal justice requires that a prosecutor and his investigative aides make a reasonable factual inquiry before reporting to a defendant and his counsel the absence of material which does in fact exist. The administration of criminal justice also requires that a federal trial be not debased by the deliberate false testimony of a man the government has chosen to serve as one of its agents.

The neglect and the debasement both occurred in this case, and the government exploited that neglect and debasement to achieve a vindictive perjury conviction.

(footnote continued from preceding page)
cording of the Finefrock-Dipp hotel room conversation in El Paso; that Cameron instructed a DEA Agent who was in Reno from Lubbock, Texas, to inquire of the El Paso DEA office about the tape recording; that Cameron was told by this agent that there was no such tape recording; that after the trial, on September 2, 1976, while talking to an El Paso DEA agent, Cameron learned the tape recording did exist and that he received the El Paso tapes on September 24, 1976.

At the perjury trial, Agent Cameron denied he met with Finefrock at Reno, Nevada, on November 20, 1975, and testified their first meeting was on March 15, 1976. Finefrock testified he would accept Agent Cameron's testimony that their first meeting was in March, 1976, instead of November, 1975.

At the perjury trial, Agent Cameron testified he received the El Paso tape recordings on July 16, 1976—one month after the end of the conspiracy trial, and not on September 24, 1976, as he had said in his affidavit.

REASON FOR GRANTING THE WRIT

THE COURT OF APPEALS HAS DECIDED A NOVEL ISSUE, CENTRAL TO THE ADMINISTRATION OF CRIMINAL JUSTICE AND DECIDED IT IN A MANNER WHICH OFFENDS PROCEDURAL AND SUBSTANTIVE DUE PROCESS OF LAW.

The Court of Appeals, relying on certain dicta in *United States v. Wong,* 431 U.S. 174 (1977), has held that an acquitted defendant may be prosecuted for perjury, with apparent prosecutorial vindictiveness, upon the basis of a secretly-made, undisclosed tape recording of a defendant's incriminating conversation with an undercover government agent who himself gave false testimony concealing his status and acts performed as an undercover agent.

The dicta from *Wong* is as follows:

> ". . . Indeed, even if the government could, on pain of criminal sanctions, compel an answer to its incriminating questions, a citizen is not at liberty to answer falsely . . . If the citizen answers the question, the answer must be truthful."

Under this draconian analysis, the Court of Appeals was able to sweep the perjury of the government agent Finefrock under the rug, with the statement that "prosecutorial misconduct which merely increases the inducement to lie does not vest the defendant with a license to lie."

The Court of Appeals, in reliance on *Wong* and *United States v. Mandujano,* 425 U.S. 564 (1976), made the expansive holding that even when a witness' constitutional rights arguably have been violated, perjury is not a

permissible response.

The effect of such doctrine appears to vest prosecution witnesses with a "license to lie." Surely this effect was not within the intendment of the Court in deciding either *Wong* or *Mandujano*.

The Court of Appeals overlooked the obligation which rests upon the Court and counsel to protect the waters of justice against the pollution of perjured testimony. *Mesarosh v. United States*, 352 U.S. 1 (1956), expressed the obligation in just that language, and quoted the following language from *Communist Party v. Subversive Activities Control Board*, 351 U.S. 115, with approval:

> "The untainted administration of justice is certainly one of the most cherished aspects of our institutions. Its observance is one of our proudest boasts. This Court is charged with supervisory functions in relation to proceedings in the federal courts. See *McNabb v. United States*, 318 U.S. 332, . . . Therefore, fastidious regard for the honor of the administration of justice requires the Court to make certain that the doing of justice be made so manifest that only irrational or perverse claims of its disregard can be asserted."

The Court of Appeals itself had earlier said in *United States v. Basurto*, 497 F.2d 781 (9th Cir. 1974):

> "At the point at which [the prosecutor] learned of the perjury before the grand jury, the prosecutor was under a duty to notify the court and the grand jury, to correct the cancer of justice that had become apparent to him. To permit the appellants to stand trial when the prosecutor knew of the perjury before the grand jury only allowed the cancer to grow."

The Court of Appeals relied exclusively on cases involving the duty of witnesses before grand juries, which cases are not applicable to a federal criminal trial where the

defendant is surrounded with a full panoply of constitutional rights to protect the very heart of the truth-seeking function and requiring the most fastidious regard for the honor of the proceeding.

The cancer created by Finefrock's false testimony was aided and abetted by the neglect of the prosecutor and his investigative aide to ascertain whether or not any written or recorded statements of the defendant existed; by the careless representation of the prosecutor to the defendant and his attorney that no such statements existed; and by the failure of these persons to produce Jencks Act material on Finefrock, who had been working for months in an undercover capacity for DEA agents across the country, as well as having been in frequent communication with DEA Agent Cameron himself. This cancer, so augmented, prevented defense counsel from fulfilling his complete and effective function of learning that the information given him by the defendant was not true, and preventing the defendant from offering perjured testimony.

In *United States v. Feinberg*, 502 F.2d 1180 (7th Cir. 1974), the court held that the purpose of pretrial and trial discovery was not limited merely to disclosures of exculpatory material:

> ". . . the overriding philosophy of pretrial discovery in criminal cases is that the defendant is entitled to know the content and circumstances of [defendant's] statement. It may be that only through disclosure will the defendant recall it or be able to appraise its completeness of content. It may be that only through disclosure will defendant's counsel learn of it.[7] Certain it is that as to the defendant, his statement will have an existence apart from the contents of a prospective witness' statement."

Note 7 of the opinion stated, in part:

> "We should not lose sight of the teachings of

> experience that defendants do 'forget' statements they have made and that one of the purposes of discovery is to assu· the effective assistance of counsel . . ."

That the right of discovery is not limited to purely exculpatory material is also one of the very purposes expressed by the Advisory Committee on Federal Rules, for the adoption of an amendment to Rule 16 of the Federal Rules of Criminal Procedure, making the production of the defendant's statements mandatory. The Advisory Committee stated:

> ". . . broad discovery contributes to the fair and efficient administration of criminal justice by providing the defendant with enough information to make an informed decision as to plea; by minimizing the undesirable effect of surprise at trial; and by otherwise contributing to an accurate determination of the issue of guilt or innocence."

The Court of Appeals states that there was no evidence the prosecutor knew of the tape's existence and intentionally withheld it in order to induce defendant to commit perjury. This statement implies that if such evidence existed, the indictment for perjury would have been dismissed. In fact, there was evidence that DEA Agent Cameron knew of the existence of the tape recording; certainly the agent Finefrock knew of its existence because he made it and at the time of the conspiracy trial he told Cameron that he had made it.

The matter of the prosecutor's ignorance of the facts is beside the point, however, because it is no longer permissible for prosecutors to be absolved of duty by ignorance or negligence as to what other prosecutors or government agencies are doing or have done. The duty to produce discoverable material falls upon the "government" in all its agencies. *United States v. Bryant,* 448 F.2d 1182 (D.C. Cir., 1971); *Santobello v. New York,* 404 U.S. 257 (1971).

So to, the issue of good faith versus bad faith misses the mark because this Court held in *United States v. Agurs,* 427 U.S. 97 (1976), that the obligation of a prosecutor to produce discoverable material upon specific request therefor is not measured by the moral culpability, or the willfulness of the prosecutor—if a prosecutor's nondisclosure of evidence to the defense results in constitutional error, it is because of the character of the evidence, not the character of the prosecutor.

Circuit Judge Hufstedler's concurring opinion recognizes that this case bears the "appearance of vindictiveness." But she and the majority of the panel failed to apply the law of the circuit that it is the apprehension of vindictiveness, or the appearance of vindictiveness (not actual vindictiveness) which necessitates the dismissal of an indictment. To avert a dismissal, the prosecution has the burden of showing the freedom of the indictment from vindictive motivation. *United States v. Groves,* 471 F.2d 450 (9th Cir. 1978). A requirement that puts the burden of proving actual malice and vindictiveness on the defendant would be literally unbearable, since officials actually so motivated could never be expected to admit it.

The circumstances of this case, in their totality, present a picture of conduct which shocks the conscience and offends the sense of justice, within the meaning of *Rochin v. California,* 342 U.S. 165 (1952), where the Court said:

> "However, this Court too has its responsibility. Regard for the requirements of the Due Process Clause 'inescapably imposes upon this Court an exercise of judgment upon the whole course of the proceedings [resulting in a conviction] in order to ascertain whether they offend those canons of decency and fairness which express the notions of justice of English-speaking peoples even toward those charged with the most

heinous offenses.' *Malinski v. New York,* supra (324 U.S. at 416, 417 . . .). These standards of justice are not authoritatively formulated anywhere as though they were specifics. Due process of law is a summarized constitutional guarantee of respect for those personal immunities which, as Mr. Justice Cardozo twice wrote for the Court, are 'so rooted in the traditions and conscience of our people as to be ranked as fundamental,' *Snyder v. Massachusetts,* 291 U.S. 97, 105 . . . , or are 'implicit in the concept of ordered liberty.' *Palko v. Connecticut,* 302 U.S. 319, 325 . . ."

A failure to review this case by certiorari would result in the spectacle of federal criminal trials serving not as honorably prosecuted ends in themselves, but as opportunities to lay a predicate by the government of nondisclosure, evasion and perjured testimony on which to mount a later perjury trial, wherein the defendant could not even protest the denial of any constitutional right.

CONCLUSION

Defendant and his counsel believe the law of perjury was never intended to displace constitutional rights. Review is requested, not as a license for any person to commit perjury, but to confirm and vindicate the honor of the judicial process and the right of defense counsel to perform freely and fully his constitutional role, confident that he may rely on what is revealed to him by the government and the prosecutor.

Respectfully submitted:

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CERTIFICATE OF SERVICE

It is hereby certified that three true and correct copies of the foregoing Petition for Writ of Certiorari was mailed this 19th day of October, 1978, postage prepaid to the Honorable Wade McCree, Jr., Solicitor General, United States Department of Justice, Washington, D.C. 20530.

APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA, Plaintiff-Appellee,	)	NO. 77-2730
vs.	)	
GEORGE RAYMOND DIPP, Defendant-Appellant.	)	**OPINION**

Appeal from the United States District Court
For the District of Nevada

Before: HUFSTEDLER, SNEED and KENNEDY, Circuit Judges.

SNEED, Circuit Judge:

Dipp appeals from his conviction for perjury in violation of 18 U.S.C. §1623. The perjury charge arose out of testimony he gave in his own behalf at an earlier trial in which he was accused of conspiracy to smuggle drugs into the United States. Appellant was acquitted of the conspiracy charge. On this appeal we must decide, first, whether the perjury prosecution was barred either by the doctrine of collateral estoppel or by the prosecutorial misconduct and, second, if not so barred, whether there was sufficient evidence introduced at the perjury trial to

establish the materiality of the allegedly false testimony in the initial trial. We find no bar to the perjury prosecution and that the evidence was sufficient to establish materiality. We, therefore, affirm the conviction.

I.

Facts.

Dipp was indicted on charges of conspiring to smuggle controlled substances into the United States from Mexico. His alleged co-conspirators, Donald Johnson and Timothy Melancon testified against him at trial. Dipp was alleged to have provided financial support for the smuggling operation, while Johnson and Melancon actually flew the drugs into the United States. Dipp's defense at trial was that he had agreed to give Johnson financial support for a legitimate venture, but had no idea that the airplanes he helped purchase were being used to smuggle marijuana. In order to bolster its case against Dipp, the government introduced the testimony of Paul Finefrock regarding a later smuggling operation in which Finefrock flew a plan supplied by Dipp. This evidence of subsequent criminal acts was used to show Dipp's knowledge of smuggling operations and as circumstantial evidence of his intent regarding the previous transaction. On the stand, Dipp denied meeting Finefrock more than once and categorically denied any involvement in a smuggling operation with him. Dipp was acquitted of the conspiracy charge.

Before the conspiracy trial the defense attorney sought broad discovery from the prosecution. The prosecutor stated that no written or recorded statements relating to the

defendant existed. When Finefrock took the stand, a further request for Jencks Act material in regard to him was made. All that was produced at that time were the prosecutor's notes from his interview with the defendant. Appellant admits that at the time Finefrock took the stand neither the prosecutor nor any of the Drug Enforcement Administration (DEA) agents directly involved in the prosecution were aware of any other material. However, after the conspiracy trial a DEA agent in the Reno office discovered that the DEA office in El Paso had a tape recording of a conversation between Finefrock and Dipp. In addition, there was a tape of a debriefing statement made by Finefrock to DEA agents following the monitored conversation with Dipp. These tapes established that Dipp had participated in a smuggling operation with Finefrock.

Following discovery of these tapes, Dipp was indicted for violating 18 U.S.C. §1623 by reason of the false testimony he had given at the conspiracy trial concerning his relationship with Finefrock. The tape was introduced at this trial and a jury convicted Dipp of perjury. This appeal is from that conviction.

II.

Collateral Estoppel As A Bar.

In one of his pre-trial motions appellant argued that the perjury prosecution should be barred by the doctrine of collateral estoppel. While Dipp did not raise this issue in his appellate brief, it is appropriate to consider this issue *sua sponte* in the light of the intervening decision of this court in *United States v. Hernandez*, ____ F.2d ____ (9th Cir. 1978).

It is now established beyond question that the doctrine of collateral estoppel applies to criminal cases as part of the constitutional protection against double jeopardy. *Ashe v. Swenson*, 397 U.S. 436 (1970). As the Supreme Court there stated—"the rule of collateral estoppel in criminal cases is not to be applied with the hypertechnical and archaic approach of a 19th century pleading book, but with realism and rationality." *Id.* at 444.

This court in *Hernandez* described the collateral estoppel doctrine as follows:

> When an issue of fact or law is actually litigated and determined by a final and valid judgment, and the determination is essential to the judgment, the determination is conclusive in a subsequent action between the parties, whether on the same or a different claim. (Restatement of the Law, 2d, Judgments, §68 (Tent. Draft No. 1, March 28, 1973)) ____ F.2d at ____.

Application of the doctrine, we said in *Hernandez*, involves a three-step process of analysis:

> (1) An identification of the issues in the two actions for the purpose of determining whether the issues are sufficiently similar and sufficiently material in both actions to justify invoking the doctrine; (2) an examination of the record of the prior case to decide whether the issue was 'litigated' in the first case; and (3) an examination of the record of the prior proceeding to ascertain whether the issue was necessarily decided in the first case. *Id.*

In *Hernandez* we applied this three-step process and concluded that the defendant's former acquittal barred a subsequent prosecution for perjury with respect to certain testimony of the defendant in the trial that resulted in his acquittal. The truthfulness or no of this testimony was a material issue in both proceedings, the truthfulness or no

was litigated in the first case, and the first case necessarily decided that the defendant's relevant testimony was true.[1]

The instant case presents a substantially different situation. While Dipp's relationship with Finefrock was an issue in both trials, we cannot say that it was "litigated" in the first trial nor can we say that it was "necessarily decided" in the first trial by the jury verdict of acquittal. Finefrock's testimony at the first trial did not relate to the conspiracy for which Dipp was being tried, but involved a later conspiracy involving different persons. This testimony was only admissible to show Dipp's knowledge of smuggling operations and his apparent intent to engage in such behavior. The jury verdict of acquittal on the charged conspiracy did not necessarily decide that the jury credited Dipp's version of the relationship with Finefrock. The jury reasonably could have believed that Dipp was heavily involved in smuggling operations with Finefrock, but that there was insufficient evidence to link him with the

[1]In *Hernandez* the defendant was initially charged with overbilling the government for legal services provided to minority businessmen. At the trial he testified that he had met not only with both partners of a certain business together, but that he had also worked extensively with one of the partners alone. That partner was not presented as a witness in the first trial. After the jury deadlocked and a mistrial was declared, the court entered a judgment of acquittal.

Some three months later a perjury indictment was returned against the defendant, charging that he had lied regarding his meetings with the partner with whom he worked alone. This partner has been located after the first trial and now asserted that he had never had any such individual meetings with the defendant. This court found that the issue in both trials was the number of hours the defendant had spent giving legal advice to this partner alone. The acquittal in the first case meant that the judge believed that the defendant had worked with this partner alone. Thus, the court necessarily decided that the defendant's relevant testimony was true. Collateral estoppel precluded the relitigation of the truthfulness of that testimony.

Johnson-Melancon conspiracy. Therefore, collateral estoppel does not bar Dipp's prosecution for falsely testifying regarding his relationship with Finefrock.

Invocation of collateral estoppel to bar prosecution for perjury following an acquittal on a conspiracy charge is frequently difficult. *See United States v. Brown*, 547 F.2d 438, fn. 2 (8th Cir.), *cert. denied*, 430 U.S. 937 (1977). An acquittal on such a charge need not mean that all elements required to prove a conspiracy were found to be lacking. If several elements were litigated, acquittal can mean that the jury found in favor of the defendant on only one element. A general verdict, however, does not reveal the identity of that element. *United States v. Tramunti*, 500 F.2d 1334 (2d Cir.), *cert. denied*, 419 U.S. 1079 (1974) (acquittal of conspiracy does not necessarily determine whether defendant was not at a meeting of the conspirators, particularly in light of weak evidence he ever agreed to conspire even if he was there); *see also United States v. Gugliaro*, 501 F.2d 68 (2d Cir. 1974).

Similarly, Dipp's acquittal cannot be viewed as turning solely on the jury's acceptance of his denial of Finefrock's testimony as true. Dipp vigorously denied the assertion that he had any connection with the conspiracy at all. Under these circumstances the jury could have disbelieved Dipp's testimony about Finefrock but acquitted him nonetheless. Therefore, collateral estoppel is inapplicable.

III.

Prosecutorial Misconduct As A Bar.

Appellant also alleges that prosecutorial misconduct in

the first trial (1) in using perjured testimony from Finefrock and (2) in failing to reveal a tape of a conversation between Finefrock and Dipp, pursuant to a broad discovery order, should bar the subsequent perjury prosecution.

Assuming *arguendo* that the prosecution knowingly used perjured testimony at the first trial, appellant's conviction could have been reversed if there was any reasonable likelihood that the false testimony could have affected the judgment of the jury. *United States v. Agurs*, 427 U.S. 97, 103 (1977). Fed. R. Crim. P. Rule 16(a)(1)(A) requires the prosecutor to produce the tape recording of Finefrock's conversation with Dipp, and while the trial judge has broad discretion in determining the sanctions for failure to comply with such an order, Rule 16(d)(2), dismissal of the charges may be an appropriate sanction in situations where the failure to produce is both willful and severely prejudicial. *United States v. Roybal*, 566 F.2d 1109 (9th Cir. 1977); *United States v. Stofsky*, 527 F.2d 237 (2d Cir. 1975), *cert. denied*, 429 U.S. 819 (1976).

These sanctions are, however, inapposite in this the perjury case. Dipp was acquitted of the conspiracy charge; he was clearly not prejudiced at the first trial by any of the alleged prosecutorial misconduct. Instead, we must decide whether the prosecutorial misconduct in the first case bars a subsequent prosecution for perjury. On the facts of this case we find no such bar. Appellant wilfully lied in the conspiracy trial when he saw that the government had no strong physical evidence supporting Finefrock's testimony. Admittedly, the inducement to lie would have been less had the government produced the tape and clarified Finefrock's position as an informant-agent. However, prosecutorial misconduct which merely increases the inducement to lie does not vest the defendant with a license to lie. It was

appellant's predisposition to lie which led to this crime. *Cf. United States v. Nickels*, 502 F.2d 1173 (7th Cir. 1974), *cert. denied*, 426 U.S. 911 (1976).

We recognize that governmental misconduct can entrap a witness into committing perjury. *Cf. LaRocca v. United States*, 337 F.2d 39 (8th Cir. 1964). This is not such a case. There is no evidence that the prosecutor knew of the tape's existence and intentionally withheld it in order to induce Dipp to commit perjury. Nor is any alleged perjury regarding Finefrock's status as a government agent so serious as to render Dipp's predisposition to lie irrelevant.

Appellant further argues that the governmental misconduct here denied him the effective assistance of counsel, since if everything had been disclosed his counsel would have advised him not to take the stand. We reject this argument. The Supreme Court has clearly established that perjury is not a permissible response even when a witness' constitutional rights arguably have been violated. Thus, the failure to give *Miranda* warnings to a witness before the grand jury does not insulate him from a perjury prosecution. *United States v. Wong*, 431 U.S. 174 (1977); *United States v. Mandujano*, 425 U.S. 564 (1976). In both these cases the Court found no fundamental unfairness in putting the witness to the choice, should he answer at all, of either incriminating himself or lying. The Court in *Wong* held that "[i]ndeed, even if the government could, on pain of criminal sanctions, compel an answer to its incriminating questions, a citizen is not at liberty to answer falsely . . . . If the citizen answers the question, the answer must be truthful." *Id.* at 1827.

Similarly, other circuits have held that even complete denial of counsel is no bar to a subsequent perjury prosecution. *United States v. Masters*, 484 F.2d 1251

(10th Cir. 1973); *United States v. Winters*, 348 F.2d 204 (2d Cir.), *cert. denied*, 382 U.S. 955 (1965). The case before us, involving only minimal interference with retained counsel, presents even less reason to bar a perjury prosecution.

IV.

Materiality of the Perjured Testimony.

Since the perjury prosecution was not barred, we must examine appellant's claims of error regarding the substantive elements necessary to establish perjury. 18 U.S.C. §1623 provides that "[w]hoever under oath . . . in any proceeding before . . . any court or grand jury of the United States knowingly makes any false material declaration . . . ." shall be guilty of a crime.[2] Appellant argues that there was insufficient evidence introduced at the perjury trial to show that the false testimony was material to the original conspiracy trial.

The case law has established very broad parameters for the definition of materiality. "[E]ssentially anything that could influence or mislead the trial court or the jury is considered material." *United States v. Whimpy*, 531 F.2d 768, 770 (5th Cir. 1976). This circuit also follows this expansive definition of the materiality element. *United*

[2]We note that the only evidence that Dipp had been placed under oath at the first trial was the statement in the reporter's transcript that "having been duly sworn" the witness testified. The statement is hearsay, but we have recently held that it is sufficient to establish the oath element of a perjury offense, absent an objection or upon laying a proper foundation. United States v. Arias, ___ F.2d ___ (9th Cir. 1978).

States v. Anfield, 539 F.2d 674 (9th Cir. 1976).

We note further that materiality is a question of law to be decided by the court, not the jury. *United States v. Percell*, 526 F.2d 189 (9th Cir. 1975); *United States v. Rivera*, 448 F.2d 757 (7th Cir. 1971). Therefore, the sufficiency of the evidence regarding materiality must be judged in terms of what was available to the judge.

In the instant case the judge considered the materiality issue at a hearing held on various pretrial motions made by the defendant. The judge had a complete transcript of the first trial available to him at this hearing. This transcript clearly shows that Dipp's testimony regarding his relationship with Finefrock, whether believed or not, could have influenced the jury on the issue of whether appellant had the requisite knowledge and intent to be guilty of the conspiracy charged there. The trial judge's finding of materiality thus fits easily within the broad definition.

Appellant argues, however, that the complete transcript must be introduced to the jury in order to establish materiality. We recognize that in *United States v. Damato*, 554 F.2d 1371 (5th Cir. 1977), the court held that there was insufficient evidence of materiality when only the allegedly false testimony was introduced to the jury. In that case, however, there was no evidence that the judge in the perjury trial considered anything more than this excerpt. A proper determination by a judge of materiality as a matter of law requires more than an excerpt. Presence of the entire transcript of the first trial and its consideration by the judge in the perjury trial eliminates the *Damato* defect.

United States v. Dipp, No. 77-2730

HUFSTEDLER, Circuit Judge, concurring:

I agree with my Brothers that double jeopardy does not bar Dipp's prosecution for perjury following his acquittal of conspiracy because the question whether Dipp met Finefrock more than once was not necessarily decided by the jury when it acquitted him.[1] I also agree that Dipp's testimony at his prior trial was sufficiently material to support a perjury charge. Finally, I agree with the conclusion that the record on direct appeal is insufficient to establish that governmental misconduct foreclosed the perjury trial. I do not join the majority opinion, however, because it implies that there may not be substance in Dipp's claims that governmental misconduct tainted the perjury trial and that an appearance of vindictiveness also infected the second trial.

Finefrock's meeting with Dipp on December 15, 1975, and Finefrock's debriefing statement to DEA agents in El Paso were both taped. In the first trial, the prosecuting attorney represented to the court that no writings existed with respect to Dipp, other than the prosecutor's own notes taken during an interview with him.[2] Throughout the conspiracy trial, DEA Agent Cameron sat with the prosecuting attorney at the counsel table. The record does

[1]Dipp's prior relationship with Finefrock was directly in issue in the first trial because the Government relied upon Finefrock's testimony to prove Dipp's intention and knowledge. The issue was also litigated because both Dipp and Finefrock testified to that relationship in the first trial. However, the issue was not necessarily decided by the jury because it could have concluded that the Government's proof of the charged conspiracy with Johnson and Melancon was unconvincing without reaching the intent and knowledge issue.

[2]The transcript of the proceedings of the conspiracy trial relating to this matter in most pertinent part is as follows:

"Pike: There are no written reports with respect to the testimony regarding Mr. Dipp.

(continued)

not reveal any audible response by Cameron, when the prosecuting attorney asked him about the existence of any written statements regarding Dipp. Defense counsel has asserted that Cameron nodded his head affirmatively when the prosecuting attorney asked him if the only material relating to Dipp's statements was the prosecutor's own notes.

In response to defense counsel's motion to dismiss the perjury prosecution, both on the grounds of prosecutorial misconduct and on the grounds of vindictiveness, based upon *Blackledge v. Perry* (1974) 417 U.S. 21, and its progeny, Agent Cameron filed an affidavit stating that he first learned of the existence of the tape recordings after the conspiracy trial, on September 2, 1976, and that he received the tapes from the El Paso DEA Office on September 24, 1976. When Cameron testified at the perjury trial, he said that he received the El Paso tapes on July 16, 1976, one month after the ending of the conspiracy trial, and not in September as he had earlier stated in his affidavit. In addition to the inconsistencies in Cameron's

(footnote continued from preceding page)

The Court: You don't have any writing at all about it?
Mr. Pike: I have my own notes that I took just talking to him. That is all the material the Government is aware of. Is that correct, Mr. Cameron? [The record does not reveal any audible response by Cameron, but defense counsel has stated that Cameron nodded his head affirmatively.]
The Court: The Government can't disclose a witness it doesn't know about.
Claiborne: He did know about it to make this motion? He must have had knowledge of it at some time, I am sure—
The Court: When did you find out about this witness?
Pike: In response to discovery, the Government indicated to counsel that there was a possibility of another witness that would go to intent, that it stood by the Jencks Act with respect to that witness. Primarily, your Honor, quite frankly because I was in fear for his safety."

own testimony, other facts in the record cast serious doubt upon Cameron's truthfulness in denying his knowledge of the tapes during the first trial and raise at least an inference that Cameron was not candid with the court when he testified both by way of affidavit and by way of oral testimony in the perjury trial.

Finefrock testified that he met Cameron and his partner, Jones, in Reno, Nevada, on November 20, 1975. Cameron arranged that meeting about four or five days earlier when he called Finefrock at his home in Oklahoma and asked him to come to Reno to respond to questions about Dipp. Acting in cooperation with several DEA offices, Finefrock was sent to El Paso in December, 1975, to meet with Dipp. This was the meeting that was tape recorded. From the sequence of events, an inference arises that Cameron was one of the DEA agents participating in setting up Finefrock's December meeting. However, neither the fact of his participation nor the extent of it is revealed by the record. Of course, if Cameron was an active participant in arranging Finefrock's December meeting with Dipp, it would be highly unlikely that Cameron would not have been fully aware of the tape recordings well before Dipp was tried for conspiracy.

In his affidavit filed in the perjury trial, Cameron testified that he learned of the tape recordings from Finefrock at the time of the conspiracy trial. He stated: "With respect to the tape recording of a meeting between Finefrock and Dipp in a motel room in El Paso, Texas, at the time of [the conspiracy] trial Finefrock did state to your affiant that there had been a tape recording of such a meeting, and your affiant instructed DEA Agent Dick Brazill, here from Lubbock, Texas, to inquire of the El Paso office as to the existence of this tape recording. Your affiant was told by

this Agent that there was no such tape recording. However, on September 2, 1976, in speaking with Agent Hal Kent of the El Paso DEA office, your affiant learned that the tape recording, did, in fact, exist and at your affiant's request, Kent sent this tape recording to the DEA Reno Task Force, and it was received by your affiant on September 24, 1976."

Cameron did not disclose to the court in the conspiracy trial his knowledge of the existence of the tape recordings, nor did he reveal that he had tried unsuccessfully to obtain the recordings. He never offered any explanation for the inconsistencies between the statements that he made in his affidavit and his testimony at the perjury trial, concerning the time that he learned the tape recordings still existed. Cameron was not cross-examined upon the statements in his affidavit. The record is barren of any evidence from which we could determine whether Cameron told the prosecuting attorney about the tape recordings or about any efforts that he may have made to locate them during the conspiracy trial.

Although the record before us on direct appeal reveals that the tape recordings were at all times in the possession of government agents and that Cameron knew that the tape recording of Finefrock's meeting with Dipp had been taped, the record is inadequate to permit us to decide whether Cameron deliberately withheld his knowledge of the tapes at the conspiracy trial or whether he misled both defense counsel and the court when he was later asked to explain the post-conspiracy trial discovery of the tapes. Under Federal Rules of Criminal Procedure 16(a)(1)(A), the Government was obligated to disclose the statements of the defendant which were "within the possession, custody, or control of the Government, the existence of which is

known, or by the exercise of due diligence may become known, to the attorney for the Government." Thus, even if the prosecuting attorney did not know about the existence of the tapes at the first trial, the Government may be chargeable with suppression of evidence if the prosecutor could have learned of the existence of that evidence by the exercise of reasonable diligence. (*Cf. United States v. Alvarado-Sandoval* (9th Cir. 1977) 557 F.2d 645; *United States v. Ruesga-Martinez* (9th Cir. 1976) 534 F.2d 1367.))

If, after an evidentiary hearing, it should be established that the Government suppressed knowledge of the existence of the tapes at the first trial, and then used the same evidence for the purpose of obtaining a perjury conviction, the second prosecution would be foreclosed because misconduct on the part of the Government would be a violation of due process. (*Cf. Giglio v. United States* (1972) 405 U.S. 150.) An inquiry into prejudice to the defendant is beside the point. The result follows, not because defendant's perjury should ever be excused, but because misconduct of the prosecution affects the integrity of the administration of criminal justice. Moreover, the taint under such circumstances does not stop with an acquittal in the first trial. Rather, the stain spreads to the second trial if it appears that the Government took advantage of its own prior misconduct and tried to cover up its misdeeds in the course of the second trial.

I join the majority opinion's conclusion that governmental misconduct did not bar the second trial because, in my view, the record before us on this direct appeal is not sufficiently developed to permit us to determine whether either Cameron, or the prosecuting attorney, or both knew about the tape recordings and failed to reveal that

knowledge at the conspiracy trial and whether either or both was a participant in covering up prior misconduct in the perjury trial.